

## ORIGINAL

UNITED STATES DISTRICT COURT  
DISTRICT OF SOUTH DAKOTA

11 IN RE MISCELLANEOUS  
12 SUBPOENAS } CASE NO: 3:16-mc-03  
13 } MOTION TO QUASH ON  
14 } BEHALF OF NON-PARTIES  
15 } WESTERN SKY FINANCIAL,  
16 } LLC AND MARTIN A. WEBB  
17 }  
18 }

## **MEMORANDUM OF POINTS AND AUTHORITIES**

## 2 | I. INTRODUCTION

3 Non-parties Western Sky Financial, LLC (“Western Sky”) and Martin A.  
4 Webb (“Mr. Webb”), both as registered agent for Western Sky and as individual, file  
5 this motion to quash pursuant to Rule 45(d)(3) of the Federal Rules of Civil  
6 Procedure, all applicable Local Rules, and Rule 45(c) of the Cheyenne River Sioux  
7 Tribe (“CRST”) Rules of Civil Procedure.

8 This motion to quash relates to three separate subpoenas simultaneously issued  
9 to Western Sky and Mr. Webb in the Eastern District of Virginia case, captioned  
10 Hayes v. Delbert Services Corporation, Case No. 3:14-cv-258:

11 (1) Subpoena to Produce Documents, Information, or Objects or to  
12 Permit Inspection of Premises in a Civil Action to Martin A. Webb as  
13 registered agent for Western Sky;  
14 (2) Subpoena to Testify at a Deposition in a Civil Action to Martin A.  
15 Webb as registered agent for Western Sky; and  
16 (3) Subpoena to Testify at a Deposition in a Civil Action to Mr. Webb  
17 individually (collectively, the “Subpoenas”).<sup>1</sup>

18 In short, none of the Subpoenas have been properly served, and compliance with the  
19 Subpoenas would subject non-parties Western Sky and Mr. Webb to undue burden  
20 and extraordinary expense. See Fed. R. Civ. P. 45(d)(3). Accordingly, quashal is  
21 both warranted and required.

22 | II. ARGUMENT

**A. The Subpoenas Should Be Quashed For Invalid Service.**

24 Courts routinely quash nonparty subpoenas that fail to comply with applicable  
25 procedural rules. See, e.g., Firefighter's Inst. for Racial Equal. ex rel. Anderson v.  
26 City of St. Louis, 220 F.3d 898, 903 (8th Cir. 2000) (reasoning that because the

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<sup>1</sup> The Subpoenas are attached hereto as Exhibits 1-3, respectively.

1 nonparty subpoena did not comply with the service procedures outlined in Rule 45,  
 2 the district court's order to quash was appropriate). That is what happened here:  
 3 service was improper and invalid under both federal and tribal law.

4 Under Rule 45 of the Federal Rules of Civil Procedure: "Serving a subpoena  
 5 requires delivering a copy to the named person and, if the subpoena requires that  
 6 person's attendance, tendering the fees for 1 day's attendance and the mileage  
 7 allowed by law." Fed. R. Civ. P. 45(b)(1). The Eighth Circuit interprets "delivery"  
 8 under the rule to require personal service. Atmosphere Hosp. Mgmt., LLC v.  
 9 Curtullo, No. 5:13-CV-05040-KES, 2015 WL 136120, at \*10 (D.S.D. Jan. 9, 2015)  
 10 ("Service of a subpoena requires personal service; it is not sufficient to leave a copy  
 11 of the subpoena at the witness' home nor can a subpoena be served by serving the  
 12 witness' lawyer."); Precourt v. Fairbank Reconstruction Corp., No. CIV. 10-MC-130,  
 13 2011 WL 310740, at \*3 (D.S.D. Jan. 28, 2011) ("the Eighth Circuit follows the  
 14 majority, which requires ***personal service*** for a nonparty subpoena) (emphasis  
 15 added); see also 9A Charles Alan Wright & Arthur R. Miller, Federal Practice and  
 16 Procedure § 2454 (4th ed. 2010) ("The use of the word 'delivering' in subdivision  
 17 (b)(1) of the rule [Rule 45] with reference to the person to be served has been  
 18 construed literally. Under this construction, contrary to the practice with regard to  
 19 the service of a summons and complaint, it is not sufficient to leave a copy of the  
 20 subpoena at the dwelling place of the witness."). Personal service is required  
 21 because "[w]hen a non-party is served, the method of service needs to be one that  
 22 will ensure the subpoena is placed in the actual possession or control of the person to  
 23 be served." Firefighter's, 220 F.3d at 903 (quashing subpoena and holding that Rule  
 24 45 "is not broad enough to include either fax or regular mail because the court cannot  
 25 be assured that delivery has occurred")

26 Just as in Firefighter's, service of the Subpoenas to Mr. Webb as the registered  
 27 agent for Western Sky and to Mr. Webb individually is improper and invalid because  
 28 Plaintiffs made no efforts to ensure the Subpoenas were placed in the actual

1 possession or control of the person to be served, Martin A. Webb. See id.; see  
 2 generally Declaration of Martin A. Webb. Specifically, none of the Subpoenas were  
 3 delivered by personal service as required. (Webb Declaration ¶¶ 2-4.) Rather,  
 4 Plaintiffs' relied upon Federal Express to mail the documents.<sup>2</sup> The Federal Express  
 5 packages did not require a signature and no effort was made to deliver those  
 6 packages to an actual person. (See id. ¶¶ 3-4.) Instead, the Federal Express  
 7 packages were left outside in the rain on the doorstep of a building, and were  
 8 discovered by someone other than Mr. Webb. (Id. ¶¶ 2-3.) Because of the rain, at  
 9 the time the Federal Express packages containing the subpoenas were found, the glue  
 10 on the packages had unsealed and the packages were partially open and the contents  
 11 were wet. (Id. ¶¶ 2-3.) To date, no one has attempted to personally serve Mr. Webb  
 12 individually or on behalf of Western Sky. (Id. ¶ 4.)

13 Moreover, even if the documents had not been left on the building doorstep  
 14 and were delivered to someone other than Mr. Webb, service would still be improper.  
 15 See Precourt, 2011 WL 310740, at \*3 (“GOPAC served the subpoenas on BPI by  
 16 leaving them with Jochum’s wife at Jochum’s residence. Jochum’s wife is not a  
 17 registered agent of BPI. Consequently, GOPAC did not properly serve the  
 18 subpoenas on BPI because GOPAC did not place the subpoenas in Jochum’s actual  
 19 possession. Accordingly, BPI’s motion to quash is granted.”).

20 Service of the Subpoenas also is improper under the Cheyenne River Sioux  
 21 Tribe (“CRST”) Rules of Civil Procedure. Mr. Webb is a member of the CRST tribe,  
 22 and lives on the CRST reservation. (Webb Declaration ¶ 1.) At the time it was  
 23 operational, Western Sky also was located within the exterior boundaries of the

24 \_\_\_\_\_  
 25 <sup>2</sup> Although Federal Express may or may not be a faster method of delivery  
 26 than regular mail in certain circumstances, the speediness of the delivery is not a key  
 27 consideration, given that the Eighth Circuit also has ruled that fax is an improper  
 28 method of serving a subpoena. Firefighter’s, 220 F.3d at 903. Rather, the key  
 consideration is a type of delivery that will ensure the subpoena was personally  
 received. Id. In this case, leaving Federal Express envelopes on the doorsteps of a  
 building in the rain surely must be just as, if not more, insufficient than service by  
 mail or fax.

1 CRST reservation, and the location where service by Federal Express mail was  
 2 improperly attempted also is within reservation boundaries. (Id. at ¶ 2.)  
 3 Accordingly, both Mr. Webb and Western Sky are governed by tribal law. Under  
 4 CRST Rule of Civil Procedure 45(c), “[a] subpoena may be served *by any tribal*  
 5 *member* who is not a party and is not less than 18 years of age.”) (emphasis added).  
 6 As established above, personal service was not affected in this case, let alone  
 7 affected by an enrolled CRST tribal member. Accordingly, service of the Subpoenas  
 8 was improper and invalid for this additional reason.

9                   **B. The Subpoenas Should Be Quashed Under FRCP 45(b)(3) For**  
 10                   **Undue Burden and Expense.**

11                  Because service was improper, the Court need not reach the burden issue. See  
 12 Atmosphere Hosp. Mgmt., 2015 WL 136120, at \*11, n.7 (“Because plaintiff never  
 13 properly served the subpoenas on Sacha, the court declines to grant plaintiff’s motion  
 14 to compel production of documents pursuant to the subpoena duces tecum directed to  
 15 Sacha.”). However, an independent ground upon which to quash the Subpoenas is  
 16 pursuant to Rule 45(d)(3), which requires the court to quash any subpoena that  
 17 “subjects a person to undue burden.” See also Fed. R. Civ. P. 45(d) (1) (“A party or  
 18 attorney responsible for issuing and serving a subpoena must take reasonable steps to  
 19 avoid imposing undue burden or expense on a person subject to the subpoena.”)  
 20 “When a nonparty is subpoenaed, the court is particularly mindful of Rule 45’s  
 21 undue burden and expense cautions.” Precourt, 280 F.R.D. at 467 (citing Wright &  
 22 Miller, at § 2459).

23                  In this case, Western Sky also moves to quash the Subpoenas because  
 24 compliance would impose an undue burden and expense on Mr. Webb to gather an  
 25 extraordinary amount of documents, and appear for two separate depositions.

26                   **1. Western Sky Document Subpoena**

27                  As initial matter, Plaintiffs’ document subpoena to Western Sky makes no  
 28 effort to narrow or tailor the documents requested and, instead, appears to be an

1 improper fishing expedition. The 37 individual document requests attached as  
 2 Exhibit A to the Western Sky document subpoena are worded so broadly that, on  
 3 their face, they essentially seek “*all*” documents whatsoever relating to Western Sky,  
 4 or Western Sky’s business relationship with the CashCall and WS Funding entities.  
 5 (See, e.g., (Request No. 20) (“All emails, correspondence or other communications  
 6 between *any officer, employee, or representative* of Western Sky and CashCall”)  
 7 (emphasis added); see also (Request No. 7) (“All documents that relate to, discuss or  
 8 describe the operational and/or financial relationship between Western Sky and  
 9 CashCall”); (Request No. 8) (“All documents that relate to, discuss or describe the  
 10 operational and/or financial relationship between CashCall and WS Funding”);  
 11 (Request No. 32) (“All document relating to the underwriting and funding of  
 12 Western Sky loans.”).<sup>3</sup>

13 At the height of its operations, Western Sky had over 100 employees, and  
 14 funded thousands of loans. Western Sky conducted all of its business with WS  
 15 Funding and CashCall. Western Sky ceased all business operations in or around  
 16 September 2013, and presently has no employees, offices, or operations of any kind.  
 17 Gathering all emails, correspondence or communications between any employee of  
 18 Western Sky or CashCall would be a significant undertaking, and one that Mr. Webb  
 19 as an individual cannot afford. The breadth of the document requests in this case  
 20 also are illustrated by the fact that several requests seek the production of documents  
 21 going back to January 1, 2005, approximately four full years before Western Sky  
 22 even began doing business and therefore are in no way tailored to elicit relevant  
 23 information. (See Request Nos. 24, 37.) Mr. Webb respectfully requests that the  
 24 Court not condone such a fishing expedition at his expense. See United States v.  
 25  
 26

27 <sup>3</sup> To fully preserve all objections, a full set of Western Sky’s Responses and  
 28 Objections to the Subpoena to Produce Documents, Information, or Objects or to  
 Permit Inspection of Premises in a Civil Action are attached hereto as Exhibit 4.

1 Libby, 432 F. Supp. 2d 26, 38-39 (D.D.C. 2006) (finding “any employee or agent”  
 2 language was part of the reason the request represented a fishing expedition).

3 Plaintiffs’ document subpoena also should be quashed because much of the  
 4 information sought could be obtained directly from parties in the action. “If the  
 5 party seeking the information can easily obtain the same information without  
 6 burdening the nonparty, the court will quash the subpoena.” Precourt, 280 F.R.D. at  
 7 467; see also Wells v. Lamplight Farms Inc., 298 F.R.D. 428, 433 (N.D. Iowa 2014)  
 8 (“Indeed, if discovery can easily be obtained from a party, it may be inappropriate to  
 9 demand the same discovery from a nonparty.”); In re Cantrell, No. 09-mc-0158-  
 10 CV-W-GAF, 2009 WL 1066011, at \*2 (W.D. Mo. Apr. 21, 2009) (quashing a  
 11 nonparty document subpoena because a party in the action had the information); Doe  
 12 v. Young, No. 4:08CV197 TIA, 2008 WL 4790309, at \*2 (E.D. Mo. Oct. 28, 2008)  
 13 (“Inasmuch as the instant record shows that other sources of information have not  
 14 been exhausted, the Court will grant the motion to quash subpoena and notice of  
 15 deposition at this time.”). For example, over half of the requests directly reference  
 16 documents related to Defendants or Defendants’ companies (e.g., CashCall, Delbert,  
 17 WS Funding, and J. Paul Reddam). (See Request Nos. 1-3, 6-9, 11-22, 24, 33-34.)

18 In addition, several of the document requests are entirely unrelated to Western  
 19 Sky or Mr. Webb in any way, and call for the disclosure of information not in  
 20 Western Sky’s possession, custody, or control or information regarding third parties  
 21 over whom Western Sky has no control. For example, Document Request No. 33  
 22 seeks “All documents concerning or related to the dissolution or winding up of  
 23 Delbert.” (Request No. 33). Delbert is a named defendant in the action, and the  
 24 document request in no way even mentions either Western Sky or Mr. Webb. (See  
 25 also (Request No. 11) (“All documents concerning, referencing or related to the  
 26 creation and/or formation of CashCall.”); (Request No. 12) (“All documents  
 27 concerning, referencing or related to the creation and/or formation of WS Funding.”).

28 Accordingly, Plaintiffs have not shown a “substantial need for the testimony

1 or material that cannot be otherwise met without undue hardship.” Fed. R. Civ. P.  
 2 45(c)(3)(B).

3 **2. Deposition Subpoenas to Western Sky and Mr. Webb**

4 The subpoena to Martin A. Webb as registered agent for Western Sky suffers  
 5 from the same infirmities as the document requests. Rule 30(b)(6) provides that the  
 6 noticing party “must describe with reasonable particularity the matters for  
 7 examination” when deposing a corporate representative. Fed. R. Civ. P. 30(b)(6). In  
 8 this case, the topics on which examination is requested are virtually unlimited and  
 9 include any and all information sought in the document requests. (Ex. 1, ¶ 1)  
 10 (seeking to examine Mr. Webb as the agent for Western Sky regarding: “Any and all  
 11 information related to or referenced in Plaintiffs’ Exhibit ‘A’ to the Subpoena to  
 12 Produce Documents, Information or Objects served simultaneously with the  
 13 Subpoena to Testify at a Deposition attached hereto.”) Such topics would put the  
 14 corporation, and Mr. Webb specifically, to the impossible task of preparing for an  
 15 open-ended, and theoretically infinite subject. This is not permitted by the rules.

16 Even putting aside defective service, Mr. Webb’s individual deposition  
 17 subpoena should be quashed because Plaintiffs have shown no need to depose him at  
 18 this time. “Preparing and sitting for a deposition is always a burden, even when  
 19 documents are not requested, particularly for a non-party.” Amini Innovation Corp.  
 20 v. McFerran Home Furnishings, Inc., 300 F.R.D. 406, 412 (C.D. Cal. 2014).  
 21 Discovery requests in this matter are premature because the case is not yet even at  
 22 issue. Plaintiffs recently filed a Second Amended Complaint in this action on May  
 23 17, 2016, and Defendants have until June 24, 2016 to file their responsive pleadings.  
 24 The return date on the Subpoenas are June 29, 2016, and July 1, 2016, respectively,  
 25 prior to any date in which the Court could rule on any pending motions.  
 26 Accordingly, Western Sky and Mr. Webb requests that this Court quash all  
 27 outstanding Subpoenas presently issued to Western Sky or Mr. Webb.

28

1 **III. CONCLUSION**

2 For all of the reasons above, Western Sky Financial, LLC and Martin A. Webb,  
3 both as registered agent for Western Sky and as an individual, respectfully request  
4 that the Court quash the Subpoenas attached hereto as Exhibit 1, Exhibit 2, and  
5 Exhibit 3.

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8 DATED: June 23, 2016

Respectfully submitted,

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10 BOGUE & BOGUE, LLP

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## CERTIFICATE OF SERVICE

2 STATE OF CALIFORNIA )  
3 COUNTY OF LOS ANGELES )

I am employed in the County of Los Angeles, State of California, I am over the age of 18 and not a party to the within action. My business address is 1990 S. Bundy Drive, Suite 705, Los Angeles, California 90025. On June 23, 2016, I served the foregoing documents [PROPOSED] ORDER on the interested party in this action, as follows:

SEE ATTACHED LIST

8 [X ] (VIA MAIL) I placed a true copy of the foregoing document in a sealed envelope  
9 addressed to each interested party as set forth above. I placed each such envelope, with postage  
10 thereon fully prepaid, for collection and mailing at Los Angeles, California. I am readily  
11 familiar with the practice for collection and processing of correspondence for mailing with the  
United States Postal Service. Under that practice, the correspondence would be deposited in the  
United States Postal Service on that same day in the ordinary course of business.

12            (E-MAIL) I caused a copy of the document to be sent to the persons at the e-mail  
13 addresses on the attached Service List via electronic transmission.

14 [X] (FEDERAL COURT ONLY) I declare that I am employed in the office of a member of the bar of this Court at whose direction the service was made.

15 I declare under penalty of perjury that the foregoing is true and correct. Executed on  
16 June 23, 2016, at Los Angeles, California.

Irene Clark  
Irene Clark

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